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No. 04-194

IN THE

Supreme Court of the United States

BRYAN P. HALL,

Petitioner,

vs.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION

A. THE BOARD'S PREMATURITY ARGUMENT IS CONTRADICTED BY THE VIEWS OF THE PENNSYLVANIA SUPREME COURT, THE THIRD CIRCUIT AND THE BOARD ITSELF LAST YEAR IN ITS OWN *CERTIORARI* PETITION.

Mr. Hall's contention that there is a direct conflict between the Pennsylvania Supreme Court and the Third Circuit on the *Ex Post Facto* issue is supported by the written determinations of seven justices of the Pennsylvania Supreme Court, at least five judges of the Third Circuit and what the Pennsylvania Board of Probation and Parole (the "Board") itself told this Court just a year ago.

In its opposition to Mr. Hall's *certiorari* petition, the Board asserts that "the Third Circuit in *Mickens-Thomas* did *not* hold that the 1996 amendment itself violated the *Ex Post Facto* Clause, but merely that the Board had done so through its mistaken interpretation of that amendment." Opposition at 6 (emphasis original). Neither the Pennsylvania Supreme Court nor the Third Circuit shares the Board's view.

In *Winklespecht* v. *Pennsylvania Board of Probation and Parole,*[1] the Pennsylvania Supreme Court concluded that the 1996 amendments to the Parole Act did not violate the *Ex Post Facto* Clause. Just a few months later, in *Mickens-Thomas* v. *Vaughn,*[2] the Third Circuit

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1 813 A.2d 688 (Pa. 2002).

2 321 F.3d 374 (CA3 2003).

reached the opposite conclusion. A few months after that, in *Finnegan* v. *Pennsylvania Board of Probation and Parole,*[3] the Pennsylvania Supreme Court explained that "[t]he Third Circuit recently held the 1996 changes to § 331.1 violated the *ex post facto* clause . . ."[4] and held that "[w]e reiterate that the 1996 revision of § 331.1 of the Parole Act does not violate the *ex post facto* clause when applied to a prisoner convicted prior to the revision."[5] In other words, the court understood itself to be in conflict with the Third Circuit's decision in *Mickens-Thomas*.

In this case, decided a year after *Mickens-Thomas,* the Pennsylvania Supreme Court explained that

> Hall recognized this divergence in legal authority when he asked us to consider his appeal in light of *Mickens-Thomas.* Accordingly, given our rejection of the *ex post facto* argument in *Winklespecht,* as clarified by *Finnegan,* at this juncture our concern is no longer a question of whether there is an *ex post facto* violation, but whether we are constrained by *Mickens-Thomas.*[6]

Had there been no conflict, there would have been no reason for the court even to consider if it were bound by the Third Circuit's decision in *Mickens-Thomas.* The three dissenting justices in *Hall* explained that "the majority recognizes that tension exists between the decisions of this court . . . and the concurrent pronouncement of the Third

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3 838 A.2d 684 (Pa. 2003).

4 838 A.2d at 689.

5 838 A.2d at 690.

6 *Hall* v. *Pennsylvania Board of Probation and Parole,* 851 A.2d 859, 863 (Pa. 2004).

Circuit Court of Appeals in *Mickens-Thomas.*"[7] Thus, all seven justices saw the conflict.

The Third Circuit also does not share the Board's understanding. For example, in *Nolan* v. *Gillis,* the Third Circuit explained that "this court decided *Mickens-Thomas* [], ruling that the 1996 amendment to 61 P.S. § 331.1 . . . violated the *Ex Post Facto* Clause when applied retroactively."[8] *See also, Hollawell* v. *Gillis* ("*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto Clause.*").[9]

Thus, whatever might be the Board's current view, the justices and judges who actually decide cases in the Pennsylvania Supreme Court and in the Third Circuit believe there to be a ripe and direct conflict.

Importantly, the Board itself saw a conflict, at least until it filed its opposition to Mr. Hall's petition. After the Third Circuit decided *Mickens-Thomas* and a companion case against the Board, the Board sought this Court's review. The petition's opponent argued that the conflict was not yet ripe, and the Board replied:

> Respondents suggest that this conflict [between the Third Circuit and the Pennsylvania Supreme Court] is either illusory . . . or tolerable, because the

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7 *Hall,* 851 A.2d at 868 (Cappy, C.J., dissenting).

8 98 Fed.Appx. 159,161 (CA3 2004).

9 65 Fed. Appx. 809, 816 (CA3 2003); *See also, McLaurin* v. *Larkins,* 76 Fed.Appx. 415 (CA3 2003), and *Hart* v. *Penn-sylvania Board of Probation and Parole,* 82 Fed.Appx. 276 (CA3 2003).

> Pennsylvania Supreme Court may, in some later case, change its mind and follow the lead of the Court of Appeals . . . As for the suggestion that this conflict may eventually resolve itself without the Court's intervention, we submit that the courts of Pennsylvania will not likely defer to the federal Court of Appeals on an issue which is so thoroughly entwined with well-settled issues of state law; and in any event, the Commonwealth's parole system cannot be left indefinitely in limbo merely on the off-chance that they might.
>
> *The conflict between the Pennsylvania and federal courts – including, but emphatically not limited to, the conflict with* Winklespecht *– must be resolved now, for the harm inflicted by the Court of Appeals is already beginning to spread.*[10]

Without this Court's intervention, the Board urged, there would be "widespread disruption to [Pennsylvania's] parole system."[11] In the year since the Board took that position, the two courts have hardened their positions, and the division has deepened. There is a direct and irreconcilable split between the Pennsylvania Supreme Court and the Third Circuit, and this Court should resolve it.

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[10] Reply to Brief in Opposition, *Gillis* v. *Hollawell,* No. 03-47, at 5-6 (filed September 9, 2003) (emphasis added). Respondent's reply is available on Westlaw at 2003 WL 22428479.

[11] *Id.* at 8.

B. THE BOARD'S EFFORT TO DISTINGUISH *GARNER* IS UNAVAILING.

In its opposition to Mr. Hall's petition, the Board addresses only in a footnote Mr. Hall's argument that the Pennsylvania Supreme Court's decision in his case conflicts with *Garner* v. *Jones*.[12] The Board's attempt to distinguish *Garner* fails.

In *Garner,* the Court explained that '[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule."[13] Thus, the proper analysis requires consideration both of the statute or rule on its face and as applied.

The Pennsylvania Supreme Court, in this case and in those that form the legal predicates for this case, ignored the practical effect and implementation of the 1996 amendments, and the court's majority focused only on the language of the statute. The three dissenting justices in *Finnegan* recognized the error: "Appellant's entitlement to a hearing on such averment is confirmed by the United States Supreme Court's decision cited by the majority, *Garner v. Jones* . . . [The majority] overlooks that *Garner* resulted in a remand for a hearing to address factual averments concerning the incidence of favorable parole determinations analogous to those presently before this

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12 529 U.S. 244 (2000).

13 *Id.*

Court."[14] The state-court majority seemed to presume that, if the statute granted discretion to the Board, there could be no *Ex Post Facto* problem.[15] *Garner* makes clear that is not so.[16]

The analysis employed by the Pennsylvania Supreme Court in this and similar cases conflicts with the analysis this Court required in *Garner,* and that provides another basis for this Court to grant review.

C. THE BOARD'S SUGGESTION THAT MR. HALL IS OBLIGATED TO SEEK *HABEAS* RELIEF BEFORE REQUESTING THIS COURT'S REVIEW IS UNSUPPORTED AND WRONG.

The Board suggests that Mr. Hall is somehow obligated to seek *habeas* review before he can seek this Court's review. No authority supports that argument.

The Court need not tarry long on that point. This Court routinely reviews matters on *certiorari* to state courts when the claims presented could later be the subject of *habeas* petitions. *See, e.g., Weaver* v. *Graham*[17] (an *Ex Post Facto* case), *Bunkley* v. *Florida*[18] and *Sattazahn* v. *Pennsylvania.*[19] This Court has never suggested that an

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14 838 A.2d at 691 (Saylor, J., dissenting).

15 *Hall,* 851 A.2d at 868 (Cappy, C.J., dissenting) (in *Finnegan,* "[t]he majority firmly stated that a change in policy guiding the discretion of the parole board can never support a claim of an *ex post facto* violation in the denial of parole.").

16 529 U.S. at 253 ("The presence of discretion does not displace the protections of the *Ex Post Facto* Clause, however.").

17 450 U.S. 24 (1981).

18 538 U.S. 835 (2003).

19 537 U.S. 101 (2003).

error by a state's highest court on a question of federal law must first be funneled through *habeas* review before this Court will correct it. Indeed, most treatises suggest the opposite.[20] Mr. Hall has properly sought this Court's intervention at this time.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to consider the three questions presented.[21]

September 17, 2004

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[20] *See, e.g.*, R. Hertz and J. Liebman, *Federal* Habeas Corpus *Practice and Procedure* at § 3.5a (4th ed. 2001).

[21] The Board has not addressed the second and third issues raised in Mr. Hall's petition. They provide additional bases for this Court to grant review.